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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE MICHAEL DILEVA, JR., Defendant and Appellant.	D056809 (Super. Ct. No. RIF126422)

APPEAL from a judgment of the Superior Court of Riverside County, Mac R. Fisher, Judge. Affirmed.

A jury convicted Lawrence Michael Dileva, Jr., of (1) gross vehicular manslaughter while intoxicated causing the death of Nicole Tropea (count 1: Pen. Code,[1] § 191.5, subd. (a)); (2) gross vehicular manslaughter while intoxicated causing the death of Molly Huckabey (count 2: § 191.5, subd. (a)); (3) driving under the influence causing injury to George Ortiz (count 3: Veh. Code, § 23153, subd. (a)); and

1 All further statutory references are to the Penal Code unless otherwise specified.

(4) driving with a blood alcohol content of 0.08 percent or higher causing injury to Ortiz (count 4: Veh. Code, § 23153, subd. (b)).

During a bifurcated bench trial, and over defense objections under *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*) and the confrontation clause of the Sixth Amendment to the United States Constitution, the court relied on records contained in a section 969b packet in finding true an enhancement allegation that Dileva had one prior prison conviction within the meaning of section 667.5, subdivision (b). The court then sentenced Dileva to a total prison term of nine years eight months.

Dileva appeals, contending (1) the evidence is insufficient to support the jury's finding that he was the driver; (2) the court prejudicially abused its discretion by admitting under Evidence Code section 1101, subdivision (b) (hereafter referred to as Evidence Code section 1101(b)), evidence of his prior acts of driving misconduct to show identity; and (3) the court's admission during the bifurcated bench trial of the records contained in the Penal Code section 969b packet as evidence that he had suffered a prior prison conviction (Pen. Code, § 667.5, subd. (b)) violated his Sixth Amendment right to confrontation. We reject these contentions and affirm the judgment.

FACTUAL BACKGROUND

A. *The People's Case*

In the evening on July 15, 2005, Dileva drove his Dodge Ram pickup truck and picked up his friend Ortiz in Riverside. Dileva and Ortiz stopped at a liquor store and purchased some alcoholic beverages. They then drove to a friend's house. Dileva drank

a few 16-ounce Sparks, an energy drink that contains malt liquor. Dileva and Ortiz stayed there for about an hour and then drove to another friend's house.

Dileva was starting to drive recklessly. Ortiz testified that Dileva started to drive "real fast" and when he approached a car in the fast lane on the freeway he passed the car on the left-hand shoulder. Ortiz, who was startled, offered to drive, but Dileva replied he was fine.

When Dileva and Ortiz arrived at the friend's house, they may have had another drink. They did not stay long, and Dileva drove them to the house of Brian Aumann, who lived about five minutes away.

Aumann's girlfriend, Krystle Ball, testified that Dileva was being loud and appeared to be intoxicated. Ball told Dileva he should not drive, and Aumann asked Dileva and Ortiz not to leave because he thought Dileva had been drinking and should not be driving. Dileva replied that he had met two women, and he was going to hang out with them. At trial, Aumann indicated he later told a detective he saw Dileva get into the driver's side of Dileva's truck and Ortiz get into the passenger's side, and Dileva was the driver as the truck drove away.

Ortiz testified that Dileva's driving was getting "sloppier," and, as they left Aumann's house, Dileva backed into and "bumped" a parked car, causing minor damage to that car. Dileva drove the truck about five minutes to Robert Willis's house, where they stayed no more than 30 minutes.

From Willis's house, Dileva drove Ortiz to the house of one of the victims, Tropea, who lived a block up the street from Willis. Tropea and Huckabey were sitting in

Tropea's car. Dileva and Ortiz got out of Dileva's truck, got in Tropea's car, and talked with Tropea and Huckabey. Huckabey got a phone call and she said she needed to go home. Tropea was going to drive Huckabey home, but Dileva said he would take her home. Ortiz testified that Dileva went to his truck and got in the driver's seat, Tropea and Huckabey got into the front seat with Dileva, and he sat in the back seat. Dileva then drove them all down Fourth Street faster than the speed limit with the radio on and the windows down. Ortiz told Dileva to slow down.

Ortiz testified that as Dileva's truck approached a stop sign at the intersection of Fourth Street and Temescal Road, Dileva turned off his headlights, drove past the stop sign without stopping, and turned the headlights back on after he drove through the intersection. Dileva did the same thing at the next intersection.

Ortiz stated that after Dileva drove through the second intersection, his truck hit something on the right side of the road and the truck went sideways. The truck started to roll and Ortiz heard "crashing" around him, "metal bending and glass breaking," and he saw both asphalt and dirt.

Erica Fernandez, an eyewitness, was with her mother in a car stopped at the intersection of Fourth Street and Corona Street. Fernandez's mother was driving, and Fernandez was in the back seat. Fernandez testified that as her mother began driving forward into the intersection, eastbound on Fourth Street, "out of nowhere" she saw headlights turn on and a truck almost hit them as it went by. She saw the truck hit a tree. Fernandez got out of the car and walked towards the truck. As she was waiting for the dust to settle, Ortiz approached her. Fernandez asked Ortiz, who was bleeding on the

right side of his head, whether he was okay, and he said, "Yes." She then asked him whether he was driving, and he said, "No." She saw the lifeless bodies of Tropea and Huckabey as they were taken out of the truck.

Ortiz testified he must have lost consciousness and when he woke up he was still inside Dileva's truck "in a weird position" and "crunched up." The truck was on its side and his passenger-side door was on the dirt. His body was still upright and "bent" in the back seat. His legs were being squeezed by the front seat, and he could not get his legs out. When he tried to get out, his seatbelt held him in. He pushed the button, "yanked" the seatbelt off, and "crawled out of the truck" through the back window. As he sat on the dirt, Ortiz was unable to see anybody inside the truck because "the roof was caved in."

When he stood up, Ortiz walked across the street and met a woman who asked him how he was doing, and he replied that he was fine. She gave him a cordless phone and he talked to a 911 dispatcher for several minutes. He told the dispatcher he did not know whether anyone in the truck had been drinking because he was "looking out" for Dileva, who was his friend, and did not want him to "get a DUI."

Responding firefighter paramedics found the truck with the roof against the tree. The truck was essentially wrapped around the tree in the yard of a home at 1160 Fourth Street. The driver's side door was open and perpendicular to the truck.

Riverside County Sheriff's Coroner Sergeant April Smith was a deputy coroner at the time of the accident. She testified that the driver's seatbelt had some jagged edges where it was torn or ripped, and it appeared to have been in use during the collision.

At around 1:22 a.m. that night, Brett Devine, an investigator with the Riverside County Sheriff's Department, received information from a neighbor that a person was moaning on the side of her house. That person was Dileva, who was found between two residences, one of which was at 1184 Fourth Street. Dileva was found about 75 feet from the truck. A pair of blue jeans, a purse, and other items were found strewn in the front yard of 1184 Fourth Street. Dileva had significant injuries. Dileva was given medical assistance and transported to a hospital where blood was drawn to determine whether he was under the influence of alcohol. Testing later determined that at the time of the accident a little before midnight Dileva had a blood alcohol content of between 0.11 and 0.13 percent.

Investigator Devine later spoke with Ortiz, who said Dileva was driving at the time of the accident. Devine interpreted Ortiz's statement, "I just crashed," to mean that he had just been involved in a traffic collision.

Criminalist Marianne Stam opined that forensic evidence suggested Ortiz was in the rear passenger seat at the time of the accident. She based her expert opinion on photographs of the truck and scene of the accident, blood patterns in the photographs, police reports, DNA reports, and the rear passenger seatbelt and buckle, among other things.

Expert collision reconstruction testimony

Collision reconstructionist Douglas Edgar reviewed the materials pertaining to the accident in this case, such as a police report, documentation of physical evidence at the scene, sheriff's department supplemental reports, photographs; medical, fire department,

and dispatch records; coroner reports and photographs, Department of Justice reports and photographs, a mechanical report on the truck, and DNA results. Edgar also went to the scene a few times. He noted the side skid marks that started on the north edge of the westbound lane of Fourth Street, went up and over the rolled asphalt berm, then went back into the westbound lane and across into the eastbound lane, with the skid marks becoming "much, much wider." He opined the driver of the truck made a "quick movement towards the right to avoid the oncoming car" where the skid marks went up and over the berm. As the truck was moving to the right as the driver was "steering hard right," the truck leaned slightly to the left.

The driver "overreact[ed]" and steered "hard left" to avoid running off the roadway. When the driver steered to the left, the truck rolled over to the right "because everything on the left side is loaded from the first turning movement." When the truck rolled to the right, the back rotated out and around, and the driver lost control. Edgar stated, "In a collision, and in physics, a body in motion wants to go straight until acted upon by an outside force," and "[i]n this case what we have is . . . steering input to the left" and "[t]hat's what the front tires are trying to do." That steering input, however, was "too great for those tires to hold the roadway," and the tires started to slip sideways resulting in skid marks that were "much wider than a normal skid mark." The truck went up and over the berm on the south edge of the roadway and into a dirt area, where the front right tire had most of the weight because the truck was rotating in a counterclockwise direction and leaning to the right. When the front right tire got up onto the dirt, it began to "dig into the dirt" on the south edge of the roadway. Edgar opined

that, with the truck leaning "heavily to the right," the right front tire "dug enough of a dirt hole" that "the rim [could] no longer force the dirt forward" and the rim stopped moving, "caus[ing] the pickup to then begin to roll."

Edgar testified that, "[d]epending on the speed, the center of mass, the dynamics of the vehicle, it is going to roll until either it runs out of energy, or it strikes another object that causes it to stop or change direction." Edgar opined that the truck rolled once and then made a "quarter roll into the tree." The physical evidence showing the truck rolled included two mirrors that were found between the "trip point" and the tree. He opined that the damage to the top of the driver's door was "consistent with a rollover." Edgar also opined that the driver's door most likely came open during the rollover when the left side of the roof impacted the ground. The sheriff's department found that the interior door handle on the driver's door was missing, and this might indicate that someone inside mistakenly grabbed the handle for something to hold onto, opening the door and breaking the handle all at the same time.

Edgar opined that the pickup truck was traveling at a speed of between 45 and 64 miles per hour when it began to leave tire marks on the asphalt berm on the north side of the roadway and between 30 and 40 miles per hour at the time it impacted the tree. A safe speed in that residential area would have been 25 miles per hour.

Edgar testified that in this particular rollover, in which the truck was rolling to the right, the driver would feel the left side coming in towards him because the driver would be going straight and the cab was beginning to roll into him. He opined there was a "very

good likelihood" that a person on the "trailing edge" of the rolling vehicle would be ejected.

Edgar opined that the rear passenger-side seatbelt was in use at the time of the crash. He based his opinion on the fact that the seatbelt was fully extended, there were blood markings on it, Ortiz had suffered injuries that were "consistent with his having had that seatbelt on at the time of this collision," and the "physical evidence within the rollover sequence" was consistent with Ortiz being in that position because he would have been ejected "[h]ad he not been belted."

Edgar also opined that Ortiz was seated in the right rear passenger seat at the time of the accident. He based his opinion on the fact that Ortiz's blood was found on the right rear seatbelt, his blood was also on the console that was in the full upright position, and a piece of dark-tinted glass removed from the right side of Ortiz's head was consistent with the glass that would have been in the right rear window. It was inconsistent with glass that would have come from the front windshield and could not have come from the driver's side unbroken window, left rear side window, or the back window—the right side of which was unbroken. Edgar also noted red streaks across the back of Ortiz's shoulder and shoulder blade that were consistent with his wearing a seatbelt over that shoulder. He opined that Ortiz crawled out of the truck "through the space vacated by the rear window," which was about a 17-inch opening.

Edgar stated that Dileva was driving his truck at the time of the accident. One basis for this opinion was that the driver must have been out of the truck at the time it hit the tree because he would have been killed had he remained in the driver's seat.

Edgar also stated that Dileva was ejected from the truck in a southwesterly direction during the rollover and "flew airborne from the area of the collision" towards the roof of the house next door. Edgar opined that when the left side of the roof hit the ground during the rollover, the driver's door began to open and, as the truck rolled onto its left side, there was "some sort of cutting failure latch release on the driver's side seatbelt," the seatbelt failed, and he was launched upwards out through the open driver's door. Dileva's path of travel through the air was the path of travel of the truck, "pretty much in a straight line towards the house" through some trees, to the left of the tree the truck hit, and onto the edge of the roof of the house next door. Dileva fell from the roof, struck a chain link fence, and was found naked from the waist down. One of his shoes was found on the roof of the house.

Edgar concluded that the factors involved in the collision—"the excessive speed, running a stop sign, the overreaction, the slow perception/reaction of the hazards that [Dileva] was facing—[were] all consistent with intoxication."

Evidence admitted under Evidence Code section 1101(b)

Jennifer Espe testified she was friends with Dileva in 2004 and frequently rode in his car while he was driving. On at least three occasions when he was driving at night, Dileva turned off his headlights and drove through stop sign intersections without stopping and then turned the lights back on after they passed through the intersections.

Additional evidence

Dileva was the registered owner of the truck he was driving the night of the accident. He was the only person designated on the insurance policy as a driver of the

truck. After the accident, Dileva made a collision coverage insurance claim for the total loss of the truck. The insurance company concluded that Dileva was driving at the time of the accident.

B. *The Defense*

Sheriff's Sergeant James Swanson testified that he assisted in the inspection of the truck after the accident and found the driver's seatbelt had been cut about three-quarters of the way through, but was still intact. He noticed that it "appeared to be stretched out, as it was possibly used."

Dileva's father testified that when Dileva woke up from his coma after the accident he had no memory of what happened before the accident, and he still had no such memory.

Suzanne Cotter testified that at around 11:00 p.m. on July 15, 2005, Dileva stopped by her home to visit her son, Robert Willis. Cotter went outside when the dog barked and saw Dileva's truck parked nearby. Dileva was outside the truck talking to Willis. She also saw a Hispanic man, whom her son referred to as George,[2] in the driver's seat. Cotter stated that no one else was in the truck or outside it.

On cross-examination, Cotter stated she lives on Fourth Street about 150 yards up the street from the scene of the accident. She was about 30 feet from the truck when she observed Ortiz inside it. There were no street lights, but there was moonlight and the

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2 As already noted, Ortiz's first name is George. During the trial, Cotter learned the man's last name was Ortiz.

next door neighbor's porch light was on. She had a conversation with Dileva that night, and he appeared alert and not drowsy.

Cotter also testified on cross-examination that Dileva's truck was "illegally parked" because it was "facing oncoming traffic in its lane . . . close to the curb." She admitted she "didn't see who was driving, who pulled up," and agreed with the prosecutor that she had no idea who was driving when Dileva and Ortiz pulled up. When asked, "You have no idea who drove after they left your house; is that fair to say?," Cotter replied, "That's true." The prosecutor then asked, "In fact, you left while all of them were still at your home; is that correct?" Cotter replied, "Yes." She agreed with the prosecutor that she could not tell the jury who was driving when the truck went down Fourth Street and collided with the tree.

Mortimer Moore, who has a Ph.D. in theoretical physics and does consulting work in accident reconstruction, opined that if Dileva's 5,000-pound truck had rolled over, the glass in the driver's side window would not have remained intact. He inspected the right rear seatbelt and found it had not been stressed. Moore opined that no could have been seated in the right rear passenger seat with the seatbelt on at the time of the accident, and anyone seated there without the seatbelt on would have been "hamburger" because "they were bouncing off curbs, they were skidding all over, they took out fence posts, and then they hit the tree."

Relying on Newton's first law of motion,[3] Moore explained that a car that is moving on a curving road, hits ice, and loses road friction would "keep going straight" on a line that is "tangent to the circle" or "tangent to the path of the rotation." He opined that, in this case, if the vehicle was rotating around in a circle, and it was "going to end up going to the right . . . of the front of the vehicle" towards the passenger side from east to west and someone inside somehow got out of the seatbelt, the truck would have to have "tilted up . . . about 45 degrees" or "[h]alfway between straight up," for a person leaving the vehicle to head "in that direction." Such a person inside the vehicle would have hit the roof or windshield because the only way such a person could be ejected from the vehicle as the driver's side is going up and over to hit the tree would be through the roof or windhield. A person in the bed of the truck would have "go[ne] flying . . . in that direction, tangent, 45 [degrees] to the ring." Moore indicated that for the person to "end up heading past the trees" without going through the roof or windshield, he would "have to come out through the side of the vehicle and then do a U-turn in midair to get up over the roof. It's kind of a hook shot." He would have to "come out . . . towards the east . . . and then in [midair] make a U-turn to . . . [g]et up over the top of the roof . . . [h]eading west."

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3 Moore explained Newton's first law of motion: "[I]f something is moving, it will move in a straight line path without changing its speed, and it will do that forever unless there is some force from the outside that either changes its speed or changes its direction of motion. [¶] So anything moving in a curved path, there's some force making that happen, otherwise it would be going straight "

Moore concluded that Dileva had been somewhere behind the cab and in the bed of the truck when he was launched. He stated that when he did his first rough calculation, he concluded that "it just wasn't going to happen" that a person inside the truck could get out of the seatbelt, get out through the driver's door, get over the top of the truck "and in the U-turn," and "still have enough speed left over to make it over a distance of 60, 70 feet." He concluded that "the only way you could really do that is if he's [*sic*] in the bed of the truck."

Moore opined it was impossible that Dileva could have been in the driver's seat at the time of the impact and "escaped from that 45-degree, making a U-turn in the sky, and hitting the shingles." He also opined that Ortiz must have been the driver.

DISCUSSION

I. *SUFFICIENCY OF THE EVIDENCE*

Dileva first contends the evidence is insufficient to support the jury's finding that he was the driver. We reject this contention.

A. *Standard of Review*

When assessing a challenge to the sufficiency of the evidence, we apply the substantial evidence standard of review under which we view the evidence in the light most favorable to the judgment and determine whether any rational trier of fact could have found the essential elements of the charged crime or allegation proven beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) Stated differently, "the court must review the whole record in the light most favorable to the

judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

"The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal. 4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

B. *Analysis*

Dileva's principal contention is that he was denied due process of law by "being convicted based on a factual theory which is impossible as being in violation of" Sir Isaac Newton's first law of motion,[4] which is a "basic law of physics." Asserting that "[t]he primary factual issue at this trial was who was driving," Dileva states that "[t]he People's factual theory supporting their contention that [he] was driving is contradicted by [Newton's first law of motion]." Specifically, he claims "the People advanced a factual theory that required [Dileva] to be ejected from [his] moving truck and fly outward from the truck through the driver's door opening in a northeasterly direction" and then

4 See fn. 3, *ante*.

"change . . . course in mid-flight to make [him] go in a southwesterly direction" in "an outright disregard of a basic law of physics."

In support of his claim, Dileva offers numerous supporting factual arguments ostensibly supported by the trial record, such as (1) "[t]he driver's seatbelt was stretched the most, indicating the person with the most mass (Ortiz) was seated there and was belted in"; (2) "[t]he objective facts tell us without any doubt that Ortiz was the driver"; (3) "[t]he driver's door opening would have been facing northeast during the last portion of the rollover that the People's expert theorized . . . as being the time of ejection"; (4) "[Dileva's] body would have had to go in that northeasterly direction to go out through the door opening"; (5) "[i]t would have continued to fly northeast because there was no external force applied during flight that would change the direction of movement to the southwest"; (5) "[t]here is absolutely no way the driver's body could have gone through the driver's door opening and then flown over the Acostas' roof to the southwest"; (6) "[t]here is no credible evidence whatsoever of a rollover"; and (7) "it is totally unexplained how a belted[-]in driver could be ejected in a northeasterly direction and do what is effectively a U-turn (a mid-air turn at least exceeding 90 degrees) during flight to then fly in a southwesterly direction toward the house" in defiance of Newton's first law of motion.

Dileva's claims are unavailing for several reasons. First, he fails to support with citations to the record the factual assertions in his opening brief on which his insufficiency-of-the-evidence claim and supporting assertions are based. Under the California Rules of Court, the parties are required to "[s]upport *any* reference to a matter

in the record" with "a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rules 8.204(a)(1)(C). 8.4,[5] italics added.) "[I]t is counsel's duty to point out portions of the record that support the position taken on appeal. The appellate court is not required to search the record on its own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768).) "A violation of the rules of court may result in the striking of the offending document, the waiver of the arguments made therein, the imposition of fines and/or the dismissal of the appeal." (*Ibid*.) Thus, if a party fails to support a particular point or argument with the necessary citations to the record, we may deem it forfeited. (*Ibid*.; accord, *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [applying former rule 14(a)(1)(C)]; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

Here, Dileva's appellant's opening brief at pages 47-61 fails to support with citations to the record *any* of his supporting factual points and arguments that are ostensibly based on evidence presented at trial. His failure to do so is a flagrant violation of rule 8.204(a)(1)(C). By failing to provide the requisite citations to the record, Dileva deprived the Attorney General (who objected to that failure) of the opportunity to challenge in his respondent's brief, as he was entitled to do, any improper or incorrect citations to the trial record.

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5 All further rule references are to the California Rules of Court.

We note that in his appellant's reply brief, Dileva states that "[r]espondent looks at [Dileva's] arguments and . . . asserts there is no citation to the record to support the statement in the opening brief that the body would have to fly in a northeasterly direction if [Dileva] was in the driver's seat." He then states, "Sure there was. The record was replete with such evidence. It's just a matter of reading the record." Such statement borders on hubris. In the interest of justice, and as a matter of fairness, Dileva was legally obligated, but failed, to provide citations to the volume and page number of the trial record where the matters of record on which he relied appear. His assertion that "[t]he Statement of Facts in [his] opening brief already covers all the necessary facts" is tantamount to telling the Attorney General he must divine which matters in the trial record Dileva is relying on as evidentiary support for each of his arguments. In this regard, we find unhelpful, and not in compliance with the spirit of the rules of court, Dileva's repeated practice of presenting a lengthy series of claimed facts in his opening brief's statement of the facts that is followed by a citation to the reporter's transcript that covers many pages of transcript, one of which is a citation to 26 pages of transcript. Such practice improperly invites both the Attorney General and this court to laboriously search an unnecessarily lengthy portion of the trial record to ascertain whether the numerous claimed matters of record on which Dileva relies are in fact in the record. This court "is not required to search the record on its own seeking error." (*Del Real v. City of Riverside*, *supra*, 95 Cal.App.4th at p. 768.) Dileva's untimely provision of citations in his appellant's reply brief does not cure his violation of rule 8.204(a)(1)(C). For all of the foregoing reasons, we deem forfeited Dileva's insufficiency-of-the-evidence claim. (See

Nwosu v. Uba, *supra*,122 Cal.App.4th at p. 1246; *Del Real*, *supra*, 95 Cal.App.4th at p. 768; *Duarte v. Chino Community Hospital*, *supra*, 72 Cal.App.4th at p. 856; *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115.)

Second, were it necessary to reach the merits of this claim, we would conclude Dileva has contravened the applicable substantial evidence standard of review by selectively relying on trial testimony that supports his theory on appeal and disregarding the large body of substantial evidence in the trial record from which we conclude any rational trier of fact could have found he was driving his truck at the time of the accident. For example, Dileva's claim that "[t]here is no credible evidence whatsoever of a rollover" is refuted by the record. Ortiz, who was in the pickup truck at the time of the accident, described how the truck rolled over after Dileva drove through the second intersection with his headlights turned off. Collision reconstructionist Edgar testified to his expert opinion that the truck rolled over and explained the physical forces that led to the rollover. He also explained in detail how Dileva was ejected from the truck, and the direction in which he was ejected, during the rollover. Sheriff's Sergeant Daniel Hinderliter explained that the markings on the road at the site of the accident were consistent with a rollover. Doyle Tucker, an auto mechanics expert, testified that the markings on the tire rims of the truck were consistent with a rollover accident. The credibility of these prosecution witnesses and the weight to be given to their testimony were matters for the jury to decide. We will not reevaluate the credibility of these witnesses. (See *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206; *People v. Jones*, *supra*, 51 Cal.3d at p. 314.)

Dileva urges this court to disregard Ortiz's direct testimony that Dileva was the driver. We note that Ortiz's testimony was consistent with the evidence of statements he made to (1) the 911 dispatcher; (2) Fernandez, the eyewitness who spoke with him immediately after the accident; and (3) Investigator Devine.

Dileva also urges this court to disregard substantial circumstantial evidence showing he was the driver, such as the testimony showing he was the only person designated on the insurance policy as a driver of the truck; he made a collision coverage insurance claim for the total loss of the truck; and his insurance company concluded he was driving at the time of the accident. Dileva would also have us disregard eyewitness Fernandez's testimony that as she and her mother began driving forward into the intersection, eastbound on Fourth Street, "out of nowhere" she saw headlights turn on and a truck almost hit them as it went by. Fernandez's testimony was consistent with that of Espe, which (as we shall discuss, *post*) the court properly admitted under Evidence Code section 1101(b), showing that in 2004 she frequently rode in Dileva's car while he was driving, and on several occasions when he was driving at night, he turned off his headlights, drove through stop sign intersections without stopping, and then turned the lights back on after they passed through the intersections. Fernandez's testimony supports a reasonable circumstantial inference that Dileva was driving his truck at the time of the accident.

In sum, even if Dileva's insufficiency of the evidence and denial of due process claims are not forfeited, the record contains substantial evidence from which any rational trier of fact could have found he was driving his truck at the time of the accident.

II. *ADMISSION OF EVIDENCE OF PRIOR DRIVING MISCONDUCT*

Dileva next contends the court prejudicially abused its discretion by admitting under Evidence Code section 1101(b) evidence of his prior acts of driving misconduct to show identity. We reject this contention.

A. *Background*

Over Dileva's objection, the court admitted under Evidence Code section 1101(b) Espe's testimony that in 2004 she frequently rode in Dileva's car while he was driving and that, on at least three occasions when Dileva was driving at night, he turned off his headlights, drove through stop sign intersections in residential areas without stopping, and then turned the lights back on after they passed through the intersections. The court made the following findings:

> "I'm going to allow [Espe] to testify. . . .What I find to be the *signature event* is less about the fact that there was or was not traffic or there was a certain speed relative to the California stop['6] or the failure to stop at the limit line or stop sign. Identifying as the signature event the fact that these were, in fact, boulevard or intersection stop signs, the events did occur at night, and that the driver, [Dileva], per this witness, at least on three occasions, possibly more, would actually physically turn off his headlights, go through the intersection, and thereafter turn them on. [¶] I find that to be a rather unusual situation. . . . [H]e purposely . . . would deactivate his lights, enter into the intersection irrespective of the speed and congestion of traffic, and then, clearing the intersection,

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6 During the Evidence Code section 402 hearing, the prosecutor asked Espe to describe how Dileva would go through the stop signs without his headlights on, and she replied that Dileva would "roll through the stop sign." During cross-examination, defense counsel asked Espe whether Dileva's turning off the headlights and rolling through a stop sign was "like a California stop," and Espe responded, "Yeah, you could say that."

> would turn his lights back on. I believe that is . . . a[n] unusual driving characteristic. So unusual that I would find it to be a *signature event* and thus allow for its admissibility . . . ." (Italics added.)

B. *Applicable Legal Principles*

Evidence of other crimes or bad acts is inadmissible when it is offered to show that a defendant had the criminal disposition or propensity to commit the crime charged. (Evid. Code, § 1101, subd. (a).) However, evidence of other crimes or misconduct by a defendant is admissible to prove a fact (e.g., motive, intent, absence of mistake or accident) other than a disposition to commit such acts (Evid. Code, § 1101(b))[7] and may be admissible to negate a claim of good faith belief or other innocent mental state. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).)

Similarity between the charged and uncharged offenses is often a factual predicate necessary to "bridge the gap between other crimes evidence and the material fact sought to be proved." (*People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23, disapproved on another ground in *People v. Rowland* (1992) 4 Cal.4th 238, 260.) For evidence of uncharged crimes to be admissible under Evidence Code section 1101(b) to prove such facts as identity, common design or plan, motive, or intent, the charged and uncharged misconduct must be "sufficiently similar to support a rational inference" of these material

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7 Evidence Code section 1101(b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

facts. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The least degree of similarity . . . is required to prove intent." (*Ewoldt, supra,* 7 Cal.4th at p. 402.) The uncharged misconduct need only be "sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same [or similar] intent in each instance." ' " (*Ibid.*; see *People v. Memro* (1995) 11 Cal.4th 786, 864-865 [defendant's uncharged conduct of possessing child pornography admissible to show intent to molest young boy].) The greatest degree of similarity between prior acts and the instant offense is required when the prior acts are being introduced to prove identity. (*Ewoldt, supra,* 7 Cal.4th at p. 403.) In demonstrating identity, the pattern and characteristics of the common features of the charged and uncharged acts "must be so unusual and distinctive as to be like a signature." (*Ibid.*)

If the trial court determines that uncharged misconduct is admissible under Evidence Code section 1101(b), it must then determine whether the probative value of the evidence is " 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (Evid. Code, § 352; *Ewoldt, supra,* 7 Cal.4th at p. 404.)[8]

Standard of review

We review the trial court's rulings under Evidence Code sections 1101 and 352 for an abuse of discretion (*People v. Lewis* (2001) 25 Cal.4th 610, 637) and will not reverse

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8 Dileva does not claim that Espe's testimony regarding his prior acts of driving through stop signs with the headlights turned off was inadmissible under Evidence Code section 352.

an evidentiary ruling unless the appellant demonstrates a manifest abuse of that discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

C. *Analysis*

Dileva's defense at trial was that Ortiz was driving Dileva's truck at the time of the accident. Thus, the identity of the driver was the dispositive factual issue to be decided by the jury.

We conclude the court did not abuse its discretion by admitting Espe's testimony regarding Dileva's prior acts of driving misconduct. Her testimony was relevant to prove a fact other than Dileva's disposition or propensity to drive past stop signs, without stopping, in residential areas at night with his headlights turned off. For purposes of Evidence Code section 1101(b), Espe's testimony was relevant to prove the *identity* of the driver at the time of the accident. Ortiz testified that as Dileva's truck approached the stop sign at the second intersection immediately before the collision occurred, Dileva turned off the headlights, drove past the stop sign without stopping, and turned the headlights back on after he drove through the intersection. Eyewitness Fernandez, who was a passenger in her mother's car, testified that as her mother began driving forward into the intersection, eastbound on Fourth Street, "out of nowhere" she saw headlights turn on and a truck almost hit them as it went by.

Dileva's prior acts of driving misconduct, as evidenced by Espe's testimony, were virtually identical to his driving misconduct in the instant case. All of the acts of driving misconduct involved Dileva's turning off his headlights at night while approaching a stop sign at an intersection in a residential area, driving past the stop sign without stopping,

and turning the headlights back on after driving through the intersection. The pattern and characteristics of the common features of the charged and uncharged acts are (as the court properly found) "so unusual and distinctive as to be like a signature." (*Ewoldt, supra*, 7 Cal.4th at p. 403.) We thus conclude Espe's testimony was admissible under Evidence Code section 1101(b) to prove the identity of the driver at the time of the accident in this matter, and thus the court did not abuse its discretion in admitting her testimony for that purpose.

III. *CONFRONTATION CLAUSE CLAIM*

Last, relying on *Melendez-Diaz*, *supra*, 129 S.Ct. 2527, Dileva contends the court's admission during the bifurcated bench trial of the section 969b[9] packet as evidence that he had suffered a prior prison conviction for purposes of section 667.5, subdivision (b), violated his Sixth Amendment right to confrontation. We reject these contentions.

A. *Applicable Legal Principles*

The confrontation clause of the Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The United States Supreme Court discussed this constitutional guarantee in *Crawford v.*

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9 In *People v. Taulton* (2005) 129 Cal.App.4th 1218 (*Taulton*), the Court of Appeal explained that section 969b "provides that 'records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which [defendant] has been imprisoned' may be used to establish prima facie evidence of prior convictions, provided 'such records or copies thereof have been certified by the official custodian of such records . . . .' The statute thus creates an exception to the hearsay rule." (*Taulton*, *supra*, at p. 1222.)

Washington (2004) 541 U.S. 36 and its progeny, including *Melendez-Diaz, supra,* 129 S.Ct. 2527. However, the contours of the confrontation clause remain elusive because the high federal court has not defined for purposes of that clause precisely who is a witness and what constitutes testimony. (See *Melendez-Diaz, supra,* 129 S.Ct. at pp. 2531-2532; *Davis v. Washington* (2006) 547 U.S. 813, 826-827; *Crawford, supra,* 541 U.S. at pp. 51-52.) Rather, the Supreme Court has described a "core class of 'testimonial' statements" that are covered by the confrontation clause, the various formulations of which include (1) " 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'[; (2)] 'extrajudicial . . . statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'[; and (3)] 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Crawford*, *supra*, 541 U.S. at pp. 51-52; *Melendez-Diaz, supra,* 129 S.Ct. at pp. 2531-2532.)

In *Crawford*, the Supreme Court explained that the confrontation clause applies to " 'witnesses' against the accused—in other words, those who 'bear testimony.' [Citation.] 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " (*Crawford, supra,* 541 U.S. at p. 51.)

Most recently, in a case involving a prosecution for distributing and trafficking in cocaine, the United States Supreme Court analyzed a defendant's right to confront the

preparer of a "certificate of analysis" (or affidavit) from a laboratory analyst that contained only the bare-bones statement that " '[t]he substance was found to contain: Cocaine.' " (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) Concluding that the affidavit was "functionally identical to live, in-court testimony," the Supreme Court held that for purposes of the confrontation clause the analyst was a witness, the analyst's affidavit was "testimonial," and thus the affidavit could not be admitted in lieu of in-court testimony unless the analyst was unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the analyst. (*Id*. at p. 2532.) The *Melendez-Diaz* court reasoned that the prosecution's failure to present the analyst at trial for cross-examination prevented the defendant from examining "what tests the analyst[] performed, whether those tests were routine, and whether interpreting [the] results required the exercise of judgment or the use of skills that the analyst[] may not have possessed." (*Id*. at p. 2537.)

B. *Analysis*

Dileva claims the court violated his Sixth Amendment rights to confrontation and cross-examination by allowing the prosecutor to present the section 969b prison packet through a "forensic technician" in the district attorney's office who rolled Dileva's fingerprints in July 2009 and then "compared them to a document from the California Department of Corrections [and] Rehabilitation that [was] contained in the packet. We conclude the court properly received the prison packet in evidence.

In *Taulton*, *supra*, 129 Cal.App.4th 1218, the Court of Appeal was presented with the question of whether section 969b prison records of prior convictions (such as those at issue here) were testimonial under *Crawford*, *supra*, 541 U.S. 36 for purposes of the

confrontation clause of the Sixth Amendment. (*Taulton*, supra, 129 Cal.App.4th at p. 1221.) Relying on *Crawford*, the *Taulton* court explained that business records are not testimonial because they "are prepared for many purposes but not to provide evidence in a potential criminal trial or to determine whether criminal charges should issue. One of the requirements for the admissibility of business records is that '[t]he writing was made in the regular course of a business . . . .' [Citation .] The purpose of such a writing is to prepare a record of an act or event pertaining to a business, not to provide evidence." (*Taulton, supra*, at p. 1224.) Observing that a similar analysis should be applied to official records, *Taulton* held that the records referenced in section 969b, such as state penitentiary records, are *not testimonial* because they are "prepared to document acts and events relating to convictions and imprisonment," and, "[a]lthough they may ultimately be used in criminal proceedings, . . . they are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue." (*Taulton, supra*, 129 Cal.App.4th at p. 1225.) Accordingly, the *Taulton* court concluded, section 969b records are "beyond the scope of *Crawford*" (*Taulton*, at p. 1225), and thus the admission of such records does not implicate the confrontation clause. (*Ibid.*; see also *People v. Morris* (2008) 166 Cal.App.4th 363, 370-371, fn. omitted [certified California Communications System (CLETS) rap sheets do not constitute testimonial hearsay under *Crawford*, and are thus admissible to prove prior prison terms, because their primary purpose is not to provide evidence in a trial; their purpose is "to permit law enforcement to track necessary information regarding the arrest, conviction, and sentencing of individuals and to communicate that information to other law enforcement agencies"].)

We agree with the holdings and reasoning of *Taulton, supra*, 129 Cal.App.4th 1218, and *People v. Morris*, *supra*, 166 Cal.App.4th 363. Dileva's reliance on *Melendez-Diaz, supra,* 129 S.Ct. 2527 and his suggestion that the analysis of his Sixth Amendment claim under *Melendez-Diaz* must differ from an analysis under *Crawford* are misplaced. The Supreme Court in *Melendez-Diaz* noted that its decision in that case "involve[d] little more than the application of our holding in [*Crawford*]." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2542.) Accordingly, we reject Dileva's contention that the court violated his federal constitutional right to confrontation by admitting the certified prison-prior packet in evidence during the bench trial on the prison prior allegations.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.